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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 251.

ETHEL ANDERSON, as Administratrix of the Estate of James Lester Anderson, Deceased,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

THOMAS A. LARKIN,
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Jacksonville 2, Florida.

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Counsel for Petitioner

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Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner prays that this Court grant a rehearing of its order of October 12, 1959 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed July 29, 1959 herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. Petitioner requested the Court to review the non-final judgment of the Court of Appeals, in the belief that *Affolder* v. *New York C. & St. L. R. Co.*, 339 US 96, 94 L. Ed. 683 authorized the request. *Affolder,* suing under the Federal Employers' Liability Act, obtained a verdict in the District Court for the Eastern District of Missouri. On a motion

for new trial the District Judge held that he had not erroneously charged the jury. 79 F. Supp. 365. The Court of Appeals for the Eighth Circuit disagreed and reversed for the sole reason that the charges were erroneous. The opinion concludes (174 F. 2d 486, 493):

> "Because of the error in the charge heretofore noted, the judgment is set aside and the cause is remanded for a new trial."

Corresponding language in the opinion of the Fifth Circuit Court of Appeals is (R. 734):

> "The instruction given was erroneous and because of the error we reverse for a new trial."

This Court granted Affolder's petition for certiorari (338 US 813), considered the case on the merits presented by the petition, reversed the Court of Appeals and affirmed the judgment of the District Court (339 US 101). There were two dissents. They were not with respect to the fact that the judgment of the Court of Appeals did not finally dispose of the case, but on account of the view of one Justice that the writ had been improvidently granted because "the case does not fall within the proper business of the Court", and because one Justice dissented on the merits. The briefs of counsel, 94 L. Ed. 685, 686, apparently did not, as here they do not, notice the non-finality of the judgment.

2. Now is the only time that petitioner can present to this Court the action of the Court of Appeals which has rendered worthless the verdict rendered in favor of the now deceased employee. At the time he died the judgment upon the verdict was an asset of his estate. No later judgment against respondent will be so. If the case is tried again in the District Court the plaintiff will be the decedent's personal representative and her measure of damages will be significantly different. It is at least speculative that the

personal representative would undertake to submit to this Court after a final judgment in the Court of Appeals the point upon which our petition for certiorari is based—but irrespective of that, if the view of the Court of Appeals is wrong, unless it be corrected now that Court's opinion will stand for an indeterminate period of time to the discomfiture of litigants under the Federal Employers' Liability Act and as the only decision of its sort.

Because of these considerations we ask leave to invoke the Court's discretion which it exercised in *Brady* v. *Terminal RR Assn.*, 302 US 678, 688, 303 US 10, 82 L. Ed. 523, 531, 614; *American Construction Co.* v. *Jacksonville T&KW R. Co.*, 148 US 372, 387, 37 L. Ed. 486, 492; *Bakery & Pastry Drivers* v. *Wohl*, 315 US 769, 773, 86 L. Ed. at page 1183; *Cafeteria Employees Union* v. *Angelos*, 319 US 753, 778, 87 L. Ed. 1707, 1724, 320 US 293, 88 L. Ed. 58, in each of which the Court on rehearing granted certiorari, which originally it had denied because of an apparent jurisdictional defect which the petition for rehearing showed to be apparent only and not actual. Exercise of the discretion here will not involve an evaluation of the facts but a ruling as to whether in an employee's case under the Federal Employers' Liability Act a rule of law so strict as to be unique will be so applied as to overturn a jury verdict. The case seems to be like one of those referred to in one of the dissenting opinions in *Rogers* v. *Missouri P. R. Co.*, 352 US 500, 532, 1 L. Ed. 2d 493, 524, 77 S. Ct. 443, as "raising questions that are not evidentiary, questions that fairly involve the construction or scope of the statute", which class of cases, it is then added, "are appropriate for review here".

Conclusion.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; that it is confined to grounds not previously presented; and that it is restricted to grounds specified in Rule 58 of the Rules of this Court.

WILLIAM MIZELLE HOWELL,
Counsel for Petitioner.

Certificate of Service.

I hereby certify that I served this document this 28th day of October, 1959, by depositing two copies of it in a United States mail box with first class postage prepaid, addressed to Louis Kurz, Esquire and Clark W. Toole, Jr., Esquire, counsel of record, at their post office address.

WILLIAM MIZELLE HOWELL,
Counsel for Petitioner.